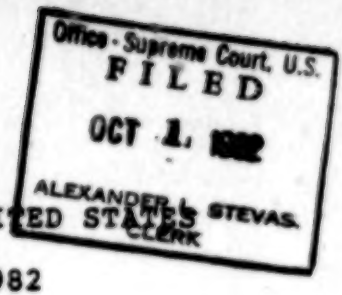

No. 82-390

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT W. BAILEY and STEVEN M. WILLETT, in their capacity as supervisory officers of the GRACE BIBLE CHURCH CHRISTIAN SCHOOL,

Petitioners,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL AND GREGORY R. ANRIG, COMMISSIONER OF EDUCATION,

Respondents.

On PETITION FOR A WRIT OF CERTIORARI To the Supreme Judicial Court for the Commonwealth of Massachusetts

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. WHETHER THE MASSACHUSETTS SUPREME JUDICIAL COURT APPLIED THE CORRECT CONSTITUTIONAL TESTS IN IT'S ANALYSIS OF PETITIONERS' FREE EXCERCISE AND ASSOCIATIONAL CLAIMS

B. WHETHER THE MASSACHUSETTS SUPREME JUDICIAL COURT CORRECTLY AFFIRMED THE GRANTING OF SUMMARY JUDGMENT ON THE CONSTITUTIONAL CLAIMS IN THIS CASE

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STATEMENT OF THE CASE

a) Nature of Proceedings

This is a petition for a writ of certiorari to review a decision of the Massachusetts Supreme Judicial Court, finding that the state's interest in the education of its children justifies the incidental burden that the private school reporting provisions of G.L. c.72, §2 have on petitioners' free exercise of religion and associational rights, and upholding the granting of summary judgment for respondent.[1/]

b) Statement of Facts

Since September, 1980, the Grace Bible Church (Church) has operated

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1/ The relevant statutory and constitutional provisions are reproduced at pp. 2-4 of the Petition for a Writ of Certiorari.

the Grace Bible Church Christian School (School), at 517 Methuen Street, Dracut, Massachusetts. Petitioner Bailey is pastor of the Church and petitioner Willett is associate pastor of the Church and administrator of the School. The School provides full-time instruction to children of compulsory school age in grades one through six.

The School was requested to provide the name, age and residence of every child of compulsory school age in attendance, as required by G.L. c.72, §2, by the School Committee of Dracut by letter dated October 7, 1980, and again by the Department of the Attorney General by letter dated November 13, 1980. In both instances the School refused to comply.

As a result, the Attorney General and the Commissioner of Education filed a complaint in Suffolk County Superior Court, seeking declaratory and injunctive relief to obtain petitioners' compliance with the reporting provisions of G.L. c.72, §2. Petitioners filed an answer claiming, among other things, that application of G.L. C.72, §2 violated the First Amendment rights of religion and freedom of association of the petitioners, parents and children attending the School. On the basis of the pleadings and affidavits submitted, respondents moved for summary judgment.

Respondents' affidavits asserted that the School was not approved as a school at which attendance satisfied compulsory school laws (Affidavit of Paul Lemiere), that letters requesting

the attendance information required by G.L. c.72, §2 had been sent to petitioners (Affidavits of John Sullivan and Maria Lopez) and that the School had never provided the requested information (Affidavit of Christos Daoulos).

At the hearing on the motion petitioners submitted affidavits from Reverend Bailey, Reverend Willett and Andre Paquette, Sr., in opposition. On the pertinent constitutional issues, petitioners Bailey and Willett made the same assertions:

> "Among the ministries of Grace Bible Church is the Grace Bible Church Christian School . . ."
>
> ". . . To provide their children with a non-christian education is believed to be a sin against the dictates of the believers' faith . . ."
>
> "The Grace Bible Church Christian School operates totally as an integral part of the church . . ."

"As a ministry of the church, Grace Bible Church Christian School is constitutionally exempt from any requirements of prior consent of civil government as a pre-condition to its operation . . ."

Respondents conceded that the operation of the School was motivated by sincerely held religious belief. There was no assertion that secrecy in name, age, and residence is a religious belief or that reporting information to secular authorities per se violated a religious belief.

Andre Paquett's affidavit merely asserted that by letter of November 26, 1980, the attorney for the Dracut School Committee informed him that in attending the Grace Bible Church Christian School his son was not in compliance with the compulsory school laws. This was uncontroverted.

On July 7, 1981, deciding that there were no disputed issues of material fact, the Superior Court issued a Memorandum and Order for Judgment granting summary judgment for respondents. The Superior Court concluded that petitioners' constitutional defenses were "without merit" and that "the Commonwealth's interest is of sufficient magnitude to override whatever constitutional interest the defendants may have in refusing to disclose the information requested." (App. 34). Petitioners requested the lower court to stay the Judgment and Order of July 7, 1981. After a hearing on July 21, 1981, the Superior Court denied petitioners' request. Petitioners filed a Notice of Appeal on August 6, 1981. The

Massachusetts Supreme Judicial Court granted the respondents' application for direct appellate review.

In their brief to and at oral argument before the Supreme Judicial Court petitioners requested the Court to find error in the Superior Court's order for failure to require the Commonwealth to show that no less restrictive alternative to the requirements of G.L. c.72, §2 existed. Petitioners suggested that the parents themselves should provide the information required by G.L. c.72, §2, or that the state should obtain the required information without enforcing the requirements of G.L. c.72, §2.

The Supreme Judicial Court rendered its opinion on June 2, 1982, affirming the Superior Court's order.

ARGUMENT

I. CERTIORARI IS NOT APPROPRIATE TO REVIEW THE DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT BECAUSE THE DECISION IS CORRECT, AND THERE IS NO CONFLICT IN THE DECISIONS OF THIS COURT AS TO THE TESTS APPLICABLE TO ANALYZE THE CONSTITUTIONAL QUESTIONS IN THIS CASE.

Petitioners argue that the Supreme Judicial Court erred in failing to require the state to demonstrate a "less drastic means" for attaining its ends, and that this Court should hear this case to clarify the standards to be used in analyzing First Amendment claims. Respondents contend that the Court below analyzed petitioners' claims of associational rights and free exercise in accordance with well-established principles.

A. Freedom of Association

The Supreme Judicial Court found that disclosure of the information sought by G.L. c.72, §2 could have adverse consequences on the associational rights of petitioners, parents, and children because the threat of truancy prosecution may deter parents from sending their children to the School, but that the state's interest in compulsory education is so compelling and the information sought so relevant that it justifies the burden. (App. 17-18).

It should be noted that this burden is not caused by the reporting requirements. There was no allegation that disclosure of the information would subject anyone associated with the School to harrassment. Thus, the

Supreme Judicial Court properly found that disclosure pursuant to G.L. c.72, §2 does not directly interfere with associational freedoms. Cf. Bates v. Little Rock, 361 U.S. 516 (1960); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958). The information required to be divulged by G.L. c.72, §2--name, age and residence--is not of a sensitive political or personal nature. It is information that is disclosed numerous times in an individual's life. Indeed, this Court has found that reporting school attendance is "ministerial and lacking ideological content or use." Committee For Public Education And Religious Liberty, v. Regan, 444 U.S. 646, 656 (1980).

The burden is caused by the threat that the state will enforce its truancy

laws once the names are obtained. That threat exists only because of the school's non-approved status.[2/] Consequently, the burden arises by operation of law. Any question as to the constitutionality of the compulsory school laws, or the constitutionality of applying them to these petitioners, is premature.

In Buckley v. Valeo, 424 U.S. 1, 66 (1975), this Court acknowledged that "there are governmental interests sufficiently important to outweigh the possibility of infringement" on First Amendment Rights. Where compelled disclosure requirements are involved, this Court has required that "there be a 'relevant correlation' or 'substantial

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2/ G.L. c.76,§1 requires children of compulsory school age to attend a public school or an approved private school.

relation' between the governmental interest and the information required to be disclosed". Id. at 64 and cases cited.

The purpose of G.L. c.72, §2 is to facilitate administration and enforcement of the state's compulsory school laws. In a long line of decisions this Court has recognized the importance of the State's interest in the education of its children. Brown v. Board of Education, 347 U.S. 483, 493 (1954); Cochran v. Board of Education, 281 U.S. 370, 375 (1930); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Myer v. Nebraska, 262 U.S. 390, 402 (1923). The information required disclosed is essential to accomplish the comparison of names required by G.L. c.72, §2, ¶1, which allows local

officials to ascertain what children are not attending school as required by law. Thus, it meets the relevancy test articulated by this Court in Buckley v. Valeo.

Petitioners claim that the Supreme Judicial Court erred because it did not require the state to prove the absence of less drastic means for fulfilling its purpose under G.L. c.72, §2. Petitioners rely on Shelton v. Tucker, 364 U.S. 479 (1960). This case differs from Shelton. In Shelton this Court struck down an Arkansas statute requiring teachers, as a condition of employment in state schools, to disclose every organization to which they belonged or contributed in the preceding five years, finding that "[t]he statute's comprehensive interference

with associational freedom goes far beyond what might be justified in the exercise of the state's legitimate inquiry into the fitness and competency of its teachers". Id. at 490. The disclosure requirements in this case do not directly or unduly interfere with associational freedom, and the information requested is not broader than the state interest to be served by it.

The Supreme Judicial Court was not required to consider whether the state had alternative means for obtaining the information, because the adverse consequences on associational rights are not caused by the disclosure requirements. Clearly, the Court was not required to consider whether the state had proven the absence of

alternative means. Such proof has never been required by this Court. Where this Court has considered whether alternative means exist, it has reached its conclusion logically. Cf., United Staes v. Lee, __U.S. __, 102 S. Ct. 1051, 71 L.Ed.2d 127 (1982). Even if a finding as to alternative means were required, less restrictive alternatives to the reporting requirements do not exist.

Petitioners suggest that requiring the parents to provide the information is a less restrictive means. That alternative does not remove the threat of prosecution constituting the burden on associational rights.

Petitioners' other suggestion is that the state should assume that every

child not appearing on an approved school list is a truant. This alternative would require the state to more closely scrutinize the activities of individuals, making more inquiries from more sources about the status of more children. Thus, this suggestion would not be less restrictive than the current procedures. In addition, the administration of such procedures would be unduly burdensome for the state and the individuals involved. Moreover, the ultimate impact on associational rights would be the same.

The petitioners' suggestions of "less restrictive alternatives" are really ways to reduce the minimal administrative burden the statute imposes on them as supervisory school officials. There is no way alter the

incidental impact which state identification of children who attend unapproved schools may have on associational rights. The threat of truancy prosecution will exist regardless of how the state obtains the information. Thus, discussion of alternatives is superfluous and futile.

B. Free Exercise Of Religion

The Supreme Judicial Court found that application of G.L. c.72, §2 only has an incidental burden on petitioners' right to free exercise, and that, because of the importance of education, the state's need for the information outweighed this burden. (App. 11, 13). It should be noted that the impact is on the operation of the School and not on religious belief. The Court found that G.L. c.72, §2 is a law that regulates

conduct. (App. 10). The burden is the deterrent effect on the operation of the School caused by the threat of truancy prosecution. That threat is made real by the School's non-approved status and not by the mere requirement that the names of compulsory school age children be reported.

Petitioners contend that the disclosure requirements do directly interfere with free exercise because they impose an obligation on church pastors. However, they cite to no belief that prohibits disclosure of identity to civil government. Cf. United States v. Lee, supra. The interference they allege is with the "Church's religious autonomy" (App. 12) not belief. This contention is without merit. There is no interference with

the Church's religious autonomy. The reporting requirements are directed to the supervisory officers of private schools, both religious and secular. In this case the School is operated by a church, and the supervisory officers of the School are the pastors of the church. These coincidences, however, do not change the scope and purpose of the statute. The statute in no way seeks to regulate matters of belief or religious practice. It is a neutral statute with a secular purpose.

In a long line of cases this Court has recognized that activities of individuals, even when religiously based, are subject to regulation by the state in the exercise of their undoubted power to promote the health, safety, and general welfare. Wisconsin v. Yoder,

406 U.S. 205, 220 (1972) and cases cited. Where a regulation is neutral, an undue burden on the free exercise of religion must be shown. Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707, 717 (1981) and cases cited. Where state requirements impinge on religious liberty, this Court has required the state to show a sufficiently compelling interest to justify the burden on First Amendment rights. Yoder, supra., at 214.

Petitioners contend that the Supreme Judicial Court erred in not requiring the state to prove that no less restrictive means for accomplishing its purpose exist. However, the Court was not required to reach this level of analysis because it did not find that

G.L. c.72, §2 imposed an undue burden on petitioners' free exercise of religion. Only an incidental burden was found. This finding is correct. The statute does not directly interfere with religious belief. Petitioners, parents and children are free to maintain their beliefs and to teach and learn the doctrines of their religion. It is the threat of truancy prosecution that burdens the operation of the school. That threat exists for reasons unconnected to the reporting requirements. To the extent that reporting is a nexus towards truancy prosecution, it is an incidental one.

Moreover, petitioners misapprehend the holdings in Sherbert v. Verner, 374 U.S. 398 (1963), Wisconsin v. Yoder, supra., and Thomas v. Review Board of

Indiana Employment Security, supra. Resolution of those cases did not turn on whether the state had less drastic means available. In those cases this Court invalidated state requirements as applied to the petitioners, because the state interests to be served by the requirements were not sufficiently compelling to justify the burden on religious freedom.

Assuming, arguendo, that consideration of alternatives to reporting under G.L. c.72, §2 is pertinent, as shown above, less drastic means do not exist. The burden caused by the threat of truancy prosecution arises by operation of law because of the School's non-approved status and not from the disclosure requirements. This burden cannot be eliminated or

minimized. It will exist regardless of how the state obtains the attendance information.

Contrary to petitioners' assertion, the case of U.S. v. Lee, supra., does not present a change in the standards previously articulated by this Court for analysis of free exercise claims. In that case an Amish employer sought an exemption from payment of social security taxes for his employees on First Amendment religious grounds. This Court found that the governmental interest in the social security system outweighed the petitioners' claim of infringement, and that accommodation of the religious interest would unduly interfere with fulfillment of the governmental interest. In numerous prior decisions this Court has upheld

state requirements which burden religious exercise where the state interest to be served justifies the burden. Braunfield v. Brown, 366 U.S. 599 (1961) (Sunday closing laws); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor laws); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination laws); Reynolds v. United States, 98 U.S. 145 (1878) (polygamy law). Here, as in those cases, the state's interest in compulsory education justifies the incidental burden on religious exercise.

II. CERTIORARI IS NOT APPROPRIATE TO REVIEW THE SUPREME JUDICIAL COURT DECISION AFFIRMING SUMMARY JUDGMENT, BECAUSE THE DECISION IS CORRECT AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Summary judgment is appropriate where the pleadings and affidavits "show that there in no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". Mass. R. of Civ. P. 56(c). The Massachusetts summary judgment rule is the same as the federal rule.

Petitioners assert that the state courts resolved questions of material fact and questions concerning the truth or falsity of religious belief. This assertion is without grounds. All of petitioners' factual assertions were accepted as true; respondents conceded, and the lower courts found, that "the

operation of the Grace Bible Church Christian School is motivated by sincerely held religious belief." (App. 11). It is significant that the Supreme Judicial Court found that G.L. c.72, §2 burdened petitioners' First Amendment rights. Although petitioners assert that the record is replete with instances where the court resolved questions of fact and belief, the only example they cite is the failure of the Commonwealth to introduce proof as to the absence of less restrictive means. That is not an example where a question of fact or belief was resolved. That example involves questions of legal standards and legal conclusions properly decided on a motion for summary judgment.

Petitioners' other contention is that summary judgment is inappropriate where bona fide constitutional claims exist. That assertion is unsupported by law. Summary judgment is appropriate in all civil cases. Mass. R. of Civ. P. 56 (a). The summary judgment procedure is the proper vehicle for disposing of constitutional questions where an adequate factual record has been presented. See Roe v. Wade, 410 U.S. 113 (1973), Graham v. Richardson, 403 U.S. 365 (1971), 6 Moore's Federal Practice ¶56.17 [10], at 56-772-76 (2d.ed. 1976).

Kennedy v. Silas Co., 334.U.S. 249 (1948) does not assist petitioners in their claim that summary judgment was improper here. In that case this Court vacated a grant of summary judgment

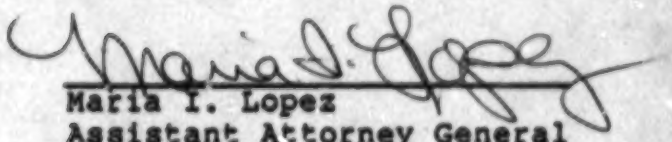
because of an inadequate record and because legal contentions presented had not been made before. The record here is adequate. Petitioners have presented all their legal theories and factual allegations to support those theories in their answer and affidavits opposing the motion for summary judgment. It should be noted that petitioners have never requested an opportunity to present additional facts in support of their claims. The facts upon which petitioners rely are all in the record. Moreover, alternatives to the reporting requirements were not absent from the lower courts' considerations. Petitioners themselves suggested alternatives to the requirements of G.L. c.72, §2.

Similarly, Perry v. Linderman, 408 U.S. 593 (1972) does not assist petitioners' claim here. In that case this Court found the existence of a genuine dispute concerning the reason for refusal to renew a teacher's employment contract. Id. at 598. There are no factual disputes in this case. The matters petitioners dispute concern constitutional standards. Those are issues of law. And, as shown above, the Supreme Judicial Court applied well-established constitutional standards in its analysis of the claims here.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be denied.

Respectfully submitted,



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